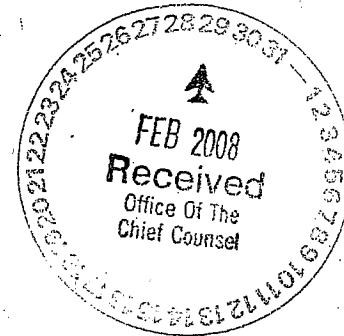


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BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of the Bay Area Clean Water  
13 Agencies' Petition for Review of Action and  
14 Failure to Act by the California Regional Water  
15 Quality Control Board, San Francisco Bay  
16 Region, in Adopting Order No. R2-2008-0003,  
17 NPDES Permit No. CA0038539 and Waste  
18 Discharge Requirements for the West County  
Agency, et al. and an accompanying Cease and  
Desist Order No. R2-2008-0004.

PETITION FOR REVIEW;  
PRELIMINARY POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITION (WATER CODE  
SECTIONS 13320 AND 13321)

19 Petitioner Bay Area Clean Water Agencies ("BACWA"), in accordance with section 13320  
20 of the Water Code, hereby petitions the State Water Resources Control Board ("SWRCB" or "State  
21 Board") to review Order No. R2-2008-0003 of the California Regional Water Quality Control  
22 Board, San Francisco Bay Region, ("RWQCB" or "Regional Board") reissuing National Pollution  
23 Discharge Elimination System ("NPDES") Permit No. CA0038539 and Waste Discharge  
24 Requirements for the West County Agency, including its member agencies West County  
25 Wastewater District, City of Richmond, and Richmond Municipal Sewer District No.1, (collectively  
26 referred to as "WCA") as well as an accompanying Cease and Desist Order ("CDO"), No. R2-2008-  
27 0004. A copy of Order Nos. R2-2008-0003 and R2-2008-0004, adopted on January 30, 2008, are  
28 attached to this Petition as **Exhibit A** and **B**. The issues and a summary of the bases for the Petition

1 follow. At such time as the full administrative record is available and any other material has been  
2 submitted, BACWA reserves the right to file a more detailed memorandum in support of the  
3 Petition and/or in reply to the Regional Board's response.<sup>1</sup> In addition, many of these issues are  
4 carried over from the previous permit appeal filed by BACWA on West County Agency's previous  
5 permit in December of 2001 (SWRCB/OCC File No. A-1439), which is hereby consolidated with  
6 this appeal and incorporated by reference herein since it is currently being held in abeyance until  
7 December 28, 2008.

8 BACWA is a joint powers authority ("JPA") whose members own and operate publicly-  
9 owned treatment works ("POTWs") that discharge treated effluent to San Francisco Bay and its  
10 tributaries. Collectively, BACWA's members serve nearly 7 million people in the nine-county  
11 Bay Area, treating all domestic, commercial and a significant amount of industrial wastewater.  
12 BACWA was formed to develop a region-wide understanding of the watershed protection and  
13 enhancement needs through reliance on sound technical, scientific, environmental and economic  
14 information and to ensure that this understanding leads to long-term stewardship of the San  
15 Francisco Bay Estuary. BACWA member agencies are public agencies, governed by elected  
16 officials and managed by professionals, who are dedicated to protecting our water environment  
17 and the public health.

18 On December 21, 2007, BACWA submitted written comments on the tentative version of  
19 NPDES Permit No. CA0038539. For the reasons contained herein, BACWA asserts that  
20 provisions contained in the recently issued permit for WCA are improper and inappropriate.  
21 BACWA hopes that the State Board will choose to take up this petition and review the issues being  
22 raised that are vitally important to Bay Area POTWs.

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27 <sup>1</sup> The State Board's regulations require submission of a statement of points and authorities in support of a petition (23  
28 C.C.R. §2050(a)(7)), and this document is intended to serve as a preliminary memorandum. However, it is impossible  
to prepare a thorough statement or a memorandum that is entirely useful to the reviewer in the absence of the complete  
administrative record, which is not yet available.

1. **NAME, ADDRESS, TELEPHONE, AND EMAIL FOR PETITIONER:**

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In addition, all materials in connection with this Petition for Review should also be provided to BACWA's special counsel at the following address:

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2. **THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:**

BACWA seeks review of Order Nos. R2-2008-0003 and R2-2008-0004, reissuing NPDES Permit No. CA0038539 for WCA (the "Permit") and the accompanying CDO. The specific requirements of the Permit that BACWA requests the State Board to review relate to the following:

- A. Numeric-based effluent limits for dioxin-TEQ;
- B. Final effluent limits for mercury;
- C. Mass limit for mercury;
- D. Daily maximum effluent limitations;
- E. Compliance schedule action plans for dioxin-TEQ, 4,4-DDD, heptachlor, cyanide, and selenium; and
- F. Inclusion of a comprehensive schedule to minimize blending.

The State Board is also requested to review the Regional Board's actions in adopting the Permit for compliance with due process and the California Administrative Procedures Act (Cal. Gov't Code §§11340, *et seq.*); the California Environmental Quality Act ("CEQA," Cal. Pub. Res.

Code §21000, *et seq.*);<sup>2</sup> the Porter-Cologne Water Quality Control Act (Cal. Water Code §§13000, *et seq.*); the Clean Water Act (“CWA”) (33 U.S.C. §§1251, *et seq.*) and its implementing regulations (40 C.F.R. Parts 122, 123, 130 and 131); the Water Quality Control Plan, San Francisco Bay Region (the “Basin Plan”); and the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (“SIP”).

**3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:**

The Regional Board adopted the Permit on January 30, 2008.

**4. A STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER:**

On February 11, 2008, the federal Environmental Protection Agency (“EPA”) approved the San Francisco Bay Basin Plan amendment incorporating a TMDL for mercury.<sup>3</sup> As a result of this approval, the Waste Discharge Requirements for Municipal and Industrial Wastewater Discharges of Mercury to San Francisco Bay, Order No. R2-2007-0077, NPDES Permit No. CA0038849, becomes effective on March 1, 2008 (“Mercury Watershed Permit”).<sup>4</sup> The Mercury Watershed Permit, which names the District as a discharger, supersedes the mercury requirements imposed in this Permit.<sup>5</sup> However, on December 3, 2007, the San Francisco Baykeeper filed a Petition for Review of the Mercury Watershed Permit. As a precaution, BACWA’s position regarding the imposition of interim compliance requirements and effluent limitations for mercury in this Permit is still being filed given San Francisco Baykeeper’s appeal of the Mercury Watershed Permit.

**A. The Regional Board Improperly Imposed Numeric Effluent Limitations for Dioxin-TEQ.**

BACWA has been concerned about the imposition of numeric effluent limitations for dioxin

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<sup>2</sup> Although the Permit at II.E. discusses an exemption from CEQA under Water Code §13389, that exemption is narrow, and only exempts Chapter 3. The remaining non-exempted parts of CEQA require all Regional Boards to consider the environmental consequences of their permitting actions, and to explore feasible alternatives and mitigation measures prior to the adoption of waste discharge requirements. *See e.g.*, Cal. Pub. Res. Code §21002; 23 C.C.R. §3733 (which states that the exemption in §13389 “does not apply to the policy provisions of Chapter 1 of CEQA”). Because this issue is currently pending before the California Supreme Court by way of a petition for review, BACWA includes this issue to preserve its rights pending resolution by that Court.

<sup>3</sup> *See* <http://www.swrcb.ca.gov/rwqcb2/TMDL/sfbaymercurytmdl.htm> (February 22, 2008).

<sup>4</sup> *See* Regional Board Order No. R2-2007-0077 at Table 3, fn. 1, pg. i.

<sup>5</sup> *See id.* at II.A, pg. 8.

1 since the California Toxics Rule ("CTR") was promulgated, notwithstanding that regulations'  
2 promise that the "rule would not impose undue or inappropriate burden on the State of California or  
3 its dischargers." 65 Fed. Reg. 31687 (May 18, 2000). BACWA was initially hopeful that the  
4 United States Environmental Protection Agency's ("USEPA") prediction that costs to meet the CTR  
5 criteria would be "unlikely to reach the high-end of the [cost] range because State authorities are  
6 likely to choose implementation options that provide some degree of flexibility or relief to the point  
7 source dischargers" was accurate; unfortunately, in practice, this has not been the case. *Id.* at 31706.  
8 The purpose of this petition is to request that the State use its presumed flexibility when issuing  
9 discharge permits where compliance with water quality criteria (whether these criteria are CTR  
10 criteria or narrative objectives) has been demonstrated to be infeasible.

11 The Permit being appealed by BACWA contains concentration limits for dioxin-TEQ and  
12 mercury, and a mass limit for mercury. Similar limits were challenged by BACWA in previous  
13 administrative and court appeals. Unfortunately, some of the holdings of those previous appeals are  
14 not being upheld by the Regional Board. BACWA tried for several years to settle the outstanding  
15 petitions on Bay Area POTW permits filed since 2000 by BACWA and others, but disagreement as  
16 to legal requirements prevented consummation of a global settlement. Because these issues remain  
17 as important today as they did seven years ago, or perhaps more important since the time for final  
18 compliance with CTR criteria becomes shorter every day, BACWA continues to press for a final  
19 ruling to re-incorporate the "flexibility or relief" promised over the years.

20 BACWA believes that the Regional Board included interim compliance requirements and  
21 final numeric water quality-based effluent limitations ("WQBELs") for these constituents in the  
22 Permit that are contrary to the requirements of the CWA and state law.<sup>6</sup> In most cases, these  
23 numeric limitations have been demonstrated to be infeasible to meet,<sup>7</sup> and could result in the  
24 permitted entities having to construct expensive new treatment facilities, if technology even exists

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27 <sup>6</sup> The Regional Board must ensure its actions to implement the CWA are consistent with any applicable provisions of  
the CWA and its implementing regulations. Cal. Water Code §13372.

28 <sup>7</sup> As defined by SWRCB Policy, "infeasible" means "not capable of being accomplished in a successful manner within  
a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." See  
SIP at Appendix 1-3.

1 to provide such treatment. These treatment technologies far exceed the mandated treatment  
2 requirements of the CWA and will likely become unnecessary once new water quality objectives,  
3 site specific objectives, or TMDLs for these substances are in place and finally approved.<sup>8</sup> Such a  
4 waste of resources is not reasonable nor required (*see* Water Code §13000), and ignores the fact that  
5 control of some substances may instead require a “carefully conceived, agency-approved, long-term  
6 pollution control procedure for a complex environmental setting.” *Communities for a Better*  
7 *Environment v. SWRCB*, 109 Cal.App.4th 1089, 1107 (2003). For these reasons, BACWA  
8 challenges these limits herein as being contrary to federal and state law requirements.

9                   1)     Numeric Effluent Limitations are Not Required.

10           The Regional Board has imposed numeric water quality-based effluent limitations  
11 (“WQBELs”) for various constituents in the Permit based on 40 C.F.R. §122.44(d). *See* Permit at  
12 Section IV.1, pg. 11. However, as explained below, section 122.44(d) does not require the  
13 imposition of *numeric* WQBELs.

14           EPA regulations require that “each NPDES permit shall include the following requirements  
15 when applicable.” *See* 40 C.F.R. § 122.44 (emphasis added). Subsection (d) of this section  
16 imposes “any requirements in addition to or more stringent than promulgated effluent limitations  
17 guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of the CWA necessary to  
18 achieve water quality standards established under Section 303 of the CWA, including State  
19 narrative criteria for water quality . . .” 40 C.F.R. § 122.44(d) (emphasis added). The regulations

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21           <sup>8</sup> Courts have recognized a step-wise process in pollutant control. In *San Francisco BayKeeper v. Whitman*, 287 F.3d  
22 764,766-767 (April 15, 2002), the Ninth Circuit Court of Appeals determined that:

23           “[w]hen the NPDES system fails to adequately clean up certain rivers, streams or smaller water segments, the Act  
24 requires the use of a water-quality based approach. States are required to identify such waters, which are to be  
25 designated as ‘water quality limited segments’ (‘WQLSs’). The states must then rank these waters in order of  
26 priority, and based on that ranking, institute more stringent pollution limits called ‘total maximum daily loads’ or  
27 ‘TMDLs.’ 33 U.S.C. §§1313(d)(1)(A), (C). TMDLs are the maximum quantity of a pollutant the water body can  
receive on a daily basis without violating the water quality standard. The TMDL calculations are to ensure that the  
cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with  
pollution from non-point sources. States must *then* institute whatever additional cleanup actions are necessary,  
which can include further controls on both point and nonpoint pollution sources.” (emphasis added).

28           Thus, the Court reasoned that the TMDL program is the tool for correcting water quality impairments when they are  
deemed to exist, not continued ratcheting down under the NPDES permitting program. Any other determination would  
render the TMDL program superfluous.

1 require the imposition of "requirements," not numeric effluent limitations. Furthermore, when  
2 numeric effluent limitations are infeasible, EPA regulations specifically authorize the use of Best  
3 Management Practices (BMPs) and other non-numeric or narrative requirements in lieu of numeric  
4 limits. 40 C.F.R. §122.44(k)(3); *see also* SWRCB Order No. WQ 2003-12 at pg. 9. Alternatively,  
5 the Regional Board could have styled this Permit after recent permits in the Central Valley Region,  
6 which have imposed final numeric limits, but stated that these limits do not apply if certain actions  
7 are undertaken by the discharger. *See* Order Nos. R5-2007-0036 and R5-2007-0039. This  
8 approach, which was not vetoed by USEPA, takes a creative approach to dealing with infeasible  
9 final limits without the necessity of compliance schedules.

10 The California Court of Appeal in the *Tesoro* case specifically ruled on this issue and stated  
11 that numeric limits are not required, and that, where infeasibility is demonstrated, numeric limits  
12 can be replaced with non-numeric requirements. *See Communities for a Better Environment v.*  
13 *SWRCB*, 109 Cal.App.4th at 1103-1105; *see accord In the Matter of the Petition of Citizens for a*  
14 *Better Environment, Save San Francisco Bay Association, and Santa Clara Audubon Society*,  
15 SWRCB Order No. WQ 91-03 (May 16, 1991). This appellate decision is binding on the State  
16 Board as a party to that case and must be followed in the case of this Permit.

17 By including final numeric effluent limitations in lieu of non-numeric or narrative  
18 requirements where numeric limits have been demonstrated to be infeasible, the Regional Board  
19 exceeded federal law requirements. If the Regional Board chooses to exceed federal law  
20 requirements, then it must comply with state law requirements. *City of Burbank, et al v. SWRCB, et*  
21 *al.*, 35 Cal. 4th 613, 627-628 (2005). However, the Regional Board failed to comply with the  
22 requirements of Water Code §13263(a), which requires consideration of several factors including  
23 those contained in Water Code §13241 when adopting numeric effluent limitations more stringent  
24 than required by federal law into this Permit.

25 Thus, the State Board should remand the Permit to the Regional Board and direct the  
26 Regional Board to comply with the provisions of 40 C.F.R. §122.44(k)(3), by removing the numeric  
27 concentration-based effluent limits for dioxin-TEQ and mercury, and the mass limit for mercury  
28 where compliance with such limits has been demonstrated to be infeasible, and replace these

1 numeric limits with narrative requirements (source control, best management practices, etc.) in lieu  
2 of the numeric limits.<sup>9</sup>

3 2) Dioxin-TEQ Limits

4 The Permit contains the following effluent limitations for dioxin-TEQ:

5 <u>AMEL (µg/L)</u>	6 <u>MDEL (µg/L)</u>	7 <u>Effective Date</u>
8 1.4 x 10 <sup>-8</sup>	9 2.8 x 10 <sup>-8</sup>	10 11/30/2011

11 The CTR did not promulgate numeric water quality criteria for dioxin-TEQ, only for  
12 2,3,7,8-tetrachlorodibenzo-p-dioxin ("2,3,7,8-TCDD"). In addition, no aquatic life criteria were  
13 promulgated in the CTR of the Basin Plan for dioxin-TEQ. Only a human-health criteria for  
14 municipal ("Water & Organisms"), and non-municipal drinking water supply waters (e.g.,  
15 "Organisms Only") were set at 0.000000013 and 0.000000014 µg/L, respectively, based on a  
16 carcinogenicity risk of 1x10<sup>-6</sup>. 40 C.F.R. §131.38(b)(1)(#16). These figures are based on an  
17 assumed exposure pathway of consumption of 6.5 grams per day of organisms from the Bay that  
18 are contaminated at a level equal to the criteria concentration, but multiplied by a  
19 "bioconcentration factor." 65 Fed. Reg. 31693 (May 18, 2000). This amount can be consumed  
20 over a lifetime (70 years) without expecting an adverse effect. *Id.* However, current detection  
21 technologies cannot measure to these levels.

22 The Permit did not show a demonstrated reasonable potential for 2,3,7,8-TCDD. *See*  
23 Permit at pg. F-22. However, the same table containing the reasonable potential analysis ("RPA")  
24 shows reasonable potential ("RP") for dioxin-TEQ, even though no adopted water quality criteria  
25 or objective exists for dioxin-TEQ upon which a RPA could be performed.<sup>10</sup> The Regional  
26 Board's action in finding reasonable potential in the absence of applicable numeric water quality  
27 criteria was unreasonable, in violation of Water Code §13000, and 40 C.F.R. §122.44(d).

28 The number used in the RPA was exactly the same as the promulgated criterion for  
2,3,7,8-TCDD. The Permit provides:

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<sup>9</sup> Such an action would negate the need for compliance schedules as well since WCA would presumably be able to immediately comply with narrative requirements for the constituents at issue.



1 "The narrative objective is translated into a numeric objective expressed in 2,3,7,8-TCDD  
2 equivalents (or dioxin-TEQ) based on the CTR criterion for 2,3,7,8-TCDD and the  
3 application of the Toxic Equivalence Factors (TEFs) for dioxins and furans adopted by the  
World Health Organization in 1998.<sup>11</sup>"

4 See Permit at pg. F-39. Given that 9 years have passed since the TEFs were first adopted by the  
5 WHO, it is unreasonable for the Regional Board to continue to use a broad narrative objective and  
6 not adopt numeric objectives and an implementation plan through a formal rulemaking process as  
7 required by Water Code §13241 and §13242, and the triennial review process required by CWA  
8 section 303, 33 U.S.C. §1313(c) and (e). Moreover, the use of a narrative objective indefinitely to  
9 skirt state law requirements also ignores the congressional mandate that water quality standards  
10 criteria "shall be specific numeric criteria for such toxic pollutants." 33 U.S.C.  
11 §1313(c)(2)(B)(emphasis added).

12 a) The Regional Board Improperly Utilized the Basin  
13 Plan's Narrative Objective for Bioaccumulation to  
14 Justify the Imposition of a Dioxin-TEQ Limit.

15 In adopting a numeric effluent limitation for dioxin-TEQ, the Regional Board attempted to  
16 justify its actions by claiming that the applicable water quality objectives specified in the Basin Plan  
17 require limits to protect against unsafe levels of dioxin in the fatty tissue of fish and other  
18 organisms. See Permit at pg. F-39. The Basin Plan contains no numeric objectives specifically set  
19 to define acceptable levels of these constituents in fish tissue or sediment, and the CTR only set  
20 numeric criteria for 2,3,7,8-TCDD, not for all the congeners of dioxins. Thus, the Regional Board  
21 improperly relied upon the Basin Plan's narrative objective for Bioaccumulation to justify limits for  
22 dioxin-TEQ.

23  
24 <sup>10</sup> It should be noted that this is contrary to the RPA for other constituents where the Permit states "No Criteria" in the  
25 table instead of inserting a non-promulgated criteria. See Permit at pg. F-21-24.

26 <sup>11</sup> The "translated" dioxin-TEQ objective of 0.014 pg/L mirrors the dioxin-TEQ objective in the State Board's 1991  
27 Enclosed Bays and Estuaries Plan ("EBEP"), which was invalidated in 1994 by the Sacramento County Superior Court  
28 due to the State Board's failure to consider economics and other factors under Cal. Water Code Section 13241, failure to  
comply with CEQA, and failure to comply with the Administrative Procedures Act ("APA"). See *Water Quality Control  
Cases*, Judicial Council Coordination Proceeding No. JC2610, Statement of Decision (Sacramento County Superior  
Court, Mar. 23, 1994). Following the Court decision, the State Board rescinded the plan, including the dioxin-TEQ  
objective of 0.014 pg/L. Thus, this invalidated and later rescinded dioxin-TEQ objective should not be used.

1 In addition, the Regional Board improperly lumped together all of the congeners of dioxin  
2 and furans. Had the RPA been done on each individual congener, most if not all would not show  
3 reasonable potential because of the varying TEF for each. See Permit at pg. F-39. However,  
4 pooling all of the congeners together creates an unnecessary finding of reasonable potential for all  
5 congeners. The Regional Board's inclusion of an effluent limit for dioxin-TEQ based on all of the  
6 congeners of dioxins and furans improperly ignores that the congeners do not create reasonable  
7 potential. Imposition of limits on congeners without reasonable potential violates the specific  
8 mandates of the Basin Plan and federal regulations.<sup>12</sup>

9 A review of the Bioaccumulation objective demonstrates that this objective does not provide  
10 authorization for the numeric limits imposed in this instance. The Bioaccumulation objective found  
11 on page 3-2 of the Basin Plan provides:

12 Many pollutants can accumulate on particles, in sediment, or  
13 bioaccumulate in fish or other aquatic organisms. Controllable water  
14 quality factors shall not cause a detrimental increase in concentrations  
15 of toxic substances found in bottom sediments or aquatic life. Effects  
on aquatic organisms, wildlife, and human health will be considered.  
(emphasis added)

16 Courts have acknowledged that the presence of dioxin may be beyond the Discharger's  
17 control. See, e.g., *Communities for a Better Environment*, 109 Cal.App.4th at 1096 ("Dioxins are  
18 not produced intentionally. They are formed as undesired byproducts of combustion and the  
19 manufacture and use of certain chlorinated chemical compounds. They exist in the environment  
20 worldwide, particularly in air, water, soils, and sediments. They enter the atmosphere through aerial  
21 emissions and widely disperse through a number of processes, including erosion, runoff, and  
22 volatilization from land or water. For example, automobile exhaust is a common source of  
23 dioxins.") Therefore, the minimal contribution of dioxin-TEQ by WCA's POTWs is not a  
24 "controllable water quality factor" that is causing a "detrimental increase in concentrations of toxic  
25 substances found in bottom sediments or aquatic life," and imposing a limit for dioxin-TEQ is not  
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27  
28 <sup>12</sup> The insertion of limits without reasonable potential is contrary to permit findings that state "WQBELs are not included in this Order for constituents that do not demonstrate reasonable potential." See Permit at pg. F-24, para. C.3.e(2).

1 necessary nor based upon the findings and evidence. Therefore, control of all of these sources is not  
2 within the jurisdiction of WCA.

3       Additionally, a numeric effluent limitation can only be imposed through a narrative water  
4 quality objective if the narrative objective contains an appropriate mechanism to “translate” the  
5 narrative requirement (*i.e.*, to translate a narrative objective into a concentration or mass effluent  
6 limitation).<sup>13</sup> In order for a numeric limit derived from a narrative objective to be appropriate, the  
7 derivation of the numeric limit must be transparent. A clear explanation of the translation from the  
8 narrative water quality objective must be set forth in the NPDES permit.<sup>14</sup> *See* 40 C.F.R.  
9 §124.8(b)(4); *Topanga Ass’n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515  
10 (1974); *California Edison v. SWRCB*, 116 Cal. App. 3d 751, 761 (1981); *see also In re Petition of*  
11 *the Pinole-Hercules Water Pollution Control Plant and County of San Francisco*, State Board  
12 Order No. WQ-95-4 at 10 (Sept. 21, 1995). The failure by the Regional Board to clearly enunciate  
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16 <sup>13</sup> Federal regulations mandate that “[w]here a State adopts narrative criteria for toxic pollutants to protect designated  
17 uses, the State must provide information identifying the method by which the State intends to regulate point source  
18 dischargers of toxic pollutants on water quality limited segments based on such narrative criteria. Such information  
19 may be included as part of the standards . . . .” 40 C.F.R. §131.11(a)(2). Since the Basin Plan’s narrative objective for  
20 Bioaccumulation does not contain an appropriate translation mechanism, the only conclusion can be that subjective,  
arbitrary, or wholly inapplicable WQBELs for dioxin-TEQ have been imposed in the Permit. The rationale in the  
21 *EBMUD* Order, SWRCB Order No. WQ 2002-0012 at pgs. 6-7 does not apply in this case, since the dioxin-TEQ limits  
22 are final WQBELs and were not adopted in conformance with federal regulations as there are no 304(a) guidance  
23 criteria for dioxin-TEQ. *See* <http://www.epa.gov/waterscience/criteria/wqcriteria.html>.

24 <sup>14</sup> In EPA’s official guidance documents, EPA explains at length the process the State must go through to implement an  
25 adequate translator mechanism. *See* EPA Water Quality Standards Handbook at 3-13 to 3-26 (1994). Among other  
26 things, EPA provides that a State’s translator procedure for narrative criteria should specifically describe:

- 27       ▪ specific, scientifically defensible methods by which the state will implement its narrative toxicity standard for  
28       all priority pollutants;
- how these methods will be integrated into the State’s priority pollutant control program;
- methods the State will use to identify those pollutants to be regulated in a specific discharge;
- an incremental cancer risk for carcinogens;
- methods for identifying compliance thresholds in permits where calculated limits are below detection;
- methods for selecting appropriate hardness, pH, and temperature variables for criteria expressed as functions;
- methods or policies controlling the size and in-zone quality of mixing zones;
- design flows to be used in translating chemical-specific numeric criteria for aquatic life and human health into  
permit limits; and
- other methods and information needed to apply standards on a case-by-case basis.

*Id.* at 3-25; *see also* EPA, TSD for Water Quality-Based Toxics Control at 30-31(1991).

1 the translation from a narrative objective to a numeric limit in the Findings or Fact Sheet of the  
2 Permit was an abuse of discretion.<sup>15</sup>

3 b) Meeting the Dioxin Concentration Limit is Not Feasible

4 As stated above, dioxins enter the environment from a variety of sources, primarily  
5 combustion sources. *See Communities for a Better Environment*, 109 Cal. App. 4<sup>th</sup> at 1096  
6 (“automobile exhaust is a common source of dioxins.”) Further, the Regional Board has concurred  
7 with WCA that compliance with the dioxin-TEQ limits is infeasible. *See Permit* at pg. F-40. For  
8 these reasons, numeric effluent limitations were not required.<sup>16</sup>

9 The Regional Board’s assertion that other strategies, including potential mass offsets (see  
10 Permit at VI.C.2.c, pg. 18), could address the impairment ignores two basic points. First, the  
11 Regional Board has historically never agreed that there is an “impairment” for dioxin in the Bay.<sup>17</sup>  
12 In addition, mass offsets will not address the ability to meet a *concentration* limit. Even the new  
13 Regional Board member, Dr. Terry Young, has previously questioned how an offset can be done for

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14  
15 <sup>15</sup> Similar arguments can be made for the imposition of the mercury mass limit, which was also imposed in the last  
16 permit (and carried over into this Permit) based on the Bioaccumulation narrative objective. If, despite the above  
17 arguments and evidence, the State Board believes that mass should be addressed on a year round performance basis,  
18 prior to the implementation of the Mercury Watershed Permit, BACWA requests that the Regional Board be directed to  
19 reclassify the proposed kg/month values for mercury as effluent “goals” that, if exceeded, would trigger mandatory,  
20 enforceable additional new source identification and control activities beyond those currently being implemented, as is  
21 done with chronic toxicity requirements. The distinction between a goal and a limit is that the goal would not be subject  
22 to mandatory minimum penalties and unnecessary civil and criminal liability.

23 <sup>16</sup> The Regional Board should have done what it did in the Vallejo permit, Order No. R2-2006-0056, which was to  
24 state: “Due to the limited monitoring data, no dioxin limits (final or interim) are established. The final limits for dioxin  
25 TEQ will be based on the WLA assigned to the Discharger in the TMDL. This Order requires additional dioxin  
26 monitoring to complement the Clean Estuary Partnership’s special dioxin project, consisting of impairment, assessment,  
27 and a conceptual model for dioxin loading into the Bay. The permit will be reopened, as appropriate, to include interim  
28 dioxin limitations when additional data become available.” Order No. R2-2006-0056 at pg. F-24.

23 <sup>17</sup> *See Letter and attachments from Loretta Barsamian, RWQCB to Alexis Strauss, EPA Region IX (Jul 14, 1998)* (“we  
24 believe the data do not support any other additions to the list at this time. This is particularly true in the case of  
25 dioxin.”)(incorporated herein by reference). The existing 303(d) listings for dioxins and furans in San Francisco Bay  
26 were made by USEPA Region IX in a letter dated May 12, 1999. These listings were made as changes (additions) to  
27 the 1998 303(d) list, which was originally adopted by the SWRCB, based on a 1994 study (San Francisco Regional  
28 Board/ SWRCB/ California Department of Fish and Game, *Contaminant Levels in Fish Tissue from San Francisco Bay*,  
December 1994). EPA based its determination on an OEHHA fish advisory, and by finding impairment of the  
Commercial and Sportfishing (COMM) use due to human consumption of fish. However, EPA’s finding ignored other  
important information such as later studies and a 1998 national dioxin health risk study that showed that dioxin levels  
and dioxin consumption rates of other protein sources (e.g., beef, dairy products) is higher than through fish  
consumption. *See Statements by Dr. William Farland, USEPA National Center for Environmental Assessment, 1998.*

1 concentration. Offset programs for concentration-based limits have not been demonstrated to be  
2 feasible. Further, no state policy for offsets exists, so the feasibility of such an approach has not  
3 been determined. For these reasons, the numeric limits for dioxin-TEQ imposed in the Permit  
4 represent an abuse of discretion.

5 **B. The Regional Board Improperly Included Final Effluent Limits for Mercury.**

6 WCA's Permit includes final effluent limits for mercury. Mercury is currently being  
7 addressed through alternative means in order to protect beneficial uses for the San Francisco Bay.  
8 Requiring final effluent limits that are unachievable by WCA for compounds that are awaiting total  
9 maximum daily load allocations (mercury, selenium, pesticides) is inappropriate. Further, many of  
10 these limits are expressed as daily maximum limits when the impracticability of longer term  
11 (weekly and monthly) limits has not been established, contrary to 40 C.F.R. §122.45(d)(2). These  
12 final limits should be only provided for reference and should not be enforceable. Therefore,  
13 BACWA requests removal of these final concentration limits.

14 BACWA is specifically concerned about mercury which is being addressed through a  
15 recently adopted TMDL. EPA Region 9 has provided an opinion that TMDLs cannot be used to  
16 delay the implementation of a final limit in a permit. This is an opinion of EPA Region 9 expressed  
17 through their recent SIP disapproval action. However, this is not a regulation adopted by either the  
18 state of California nor the USEPA. Furthermore, EPA's recent action is contrary to appellate case  
19 law that affirms the deference of final numeric effluent limits until a TMDL can be implemented.  
20 For these reasons BACWA strongly objects to having final limits for mercury when BACWA  
21 members have worked tirelessly with the Clean Estuary Partnership (CEP), the Regional Water  
22 Board and the State Water Board to have a final mercury TMDL adopted.

23 BACWA urges the State Water Board to question EPA Region 9's recent action and to  
24 repromulgate compliance schedule authority to deal with TMDL-based schedules as well as  
25 allowing compliance schedules for any new or more stringent effluent limit imposed. In the  
26

27  
28 More recent studies have also shown the benefits of eating fish notwithstanding health advisories for mercury or  
dioxins. Therefore, an advisory to avoid fish consumption may actually increase the health risk to Bay area residents.

interim, the State Water Board should overturn the use of final limits prior to the implementation of a TMDL.

**C. The Regional Board Improperly Imposed Mercury Limits.**

**1) Mercury Concentration Limits**

The Permit contains final concentration limits for mercury at page 11, Table 7. These limits were derived from the Basin Plan objectives of 2.1 and 0.025 µg/L,<sup>18</sup> for acute and chronic criteria, respectively. *See* Permit at pg. F-33. There was no reasonable potential to trigger these limits since the objective used to determine reasonable potential was recently deleted from the Basin Plan and no reasonable potential exists under the CTR criteria. *See* Permit at pgs. F-21, F-33-34.

The 1998 303(d) list stated that “current data indicate fish consumption and wildlife consumption impacted uses: health consumption advisory in effect for multiple fish species including striped bass and shark. Major source is historic: gold mining sediments and local mercury mining; most significant ongoing source is erosion and drainage from abandoned mines; moderate to low level inputs from point sources.” *See* 1998 303(d) List at pg. 8 (approved by USEPA on May 12, 1999). Further, EPA’s own response to comments stated that “The existence of the fish consumption advisory provides a strong rationale for determining that the fishing beneficial use of the Bay is impaired and that the Bay should be listed on the 303(d) list.” *See* Responsiveness Summary for Comments Directed to the State Water Resources Control Board, prepared by Joe Karkoski and Dave Smith, USEPA at pg. 9 (October 19, 1998). Thus, there is no evidence in the listing record that the aquatic life use was impaired, or that the 0.025 µg/L was the water quality standard representing the basis of the 303(d) listing. *See accord* SWRCB Order No. WQ 2001-06

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<sup>18</sup> The 0.025 criterion has been recently removed from the Basin Plan and is no longer a valid water quality objective. BACWA supported removal of that old criterion for the reasons stated in its comments to the State Board in 2005 on the Mercury TMDL. In those comments, BACWA stated the 4-day mercury water quality standard was poorly designed with a bad technical basis in addition to being obsolete. This water quality objective did not take into account the conditions in the Bay where there is shallow water and high winds, causing the sediments to be re-suspended in the water column. In BACWA’s review of the RMP data, BACWA concluded that even if mercury levels attained pre-industrial, pre-mining, pristine concentrations of 0.1 ppm, the water column objective of 0.025 µg/L would not be attained everywhere in the Bay without implementing massive dredging projects to modify the Bay’s bathymetry. Moreover, the Basin Plan indicates that the 0.025 µg/L standard was based on the level of detection and not necessarily a level to protect aquatic life. *See* 1995 Basin Plan at pg. 3-10, footnote i.

1 at pgs. 31-33 (remanding mercury concentration limit). In fact, data from the Regional Monitoring  
2 Program submitted by the predecessor of BACWA demonstrated that mercury concentrations were  
3 not above the 0.025 µg/L levels in the areas of San Francisco Bay to which this objective applied.  
4 See Letter from Bay Area Dischargers Association to Loretta Barsamian, SFRWQCB at Attachment  
5 B (Feb. 2, 1998).

6 Therefore, the 303(d) listing is not dispositive of a water column impairment and imposing a  
7 concentration-based limits for this reason is not justified, particularly when a mass limit is also  
8 imposed. For these reasons, the mercury concentration limits should be removed as unnecessary  
9 and improperly justified.

10 2) Mercury Mass Limits

11 Effluent Limitation IV.6 on pages 14-15 of the Permit contains a mass limit for mercury that  
12 limits the discharge of this constituent to a 12-month moving average annual load that shall not  
13 exceed 0.72 kg/month until such time that a Total Maximum Daily Load ("TMDL")<sup>19</sup> is required  
14 under CWA §303(d) and has been completed. See Permit at IV.6. at pgs. 14-15.

15 In adopting this permit limitation, the Regional Board acted in a manner that is inconsistent  
16 with CWA requirements, as the adoption of water quality-based effluent limitations for POTWs to  
17 address an alleged impairment before the adoption and implementation of TMDLs was neither  
18 intended by Congress, nor mandated by the CWA.

19 Congress, in the CWA, required that, where water quality standards were not being  
20 implemented even after the imposition of technology-based effluent limits, those waters were to be  
21 placed on the "303(d) List" and TMDLs were to be established at a level necessary to implement or  
22 achieve the standards. 33 U.S.C. §1313(d)(1)(C). This statutory provision makes clear that Congress  
23 intended water quality-based effluent limits to be based on the results of a TMDL process. This  
24  
25  
26  
27

28 <sup>19</sup> A TMDL is a quantitative assessment of the mass loading of a pollutant that can be discharged to a waterbody each day and still implement the applicable water quality standards.

1 interpretation is consistent with the implementation language of the Basin Plan<sup>20</sup> and EPA  
2 guidance.<sup>21</sup>

3 The mere listing of a pollutant on the §303(d) list does not constitute conclusive evidence  
4 that there is a lack of assimilative capacity in the receiving water for that pollutant. SWRCB WQ  
5 Order No. 2001-06 at 23 (March 7, 2001). Under EPA regulations and the 1998 Clean Water Act  
6 Section 303(d) Listing Guidelines for California (August 11, 1997), a water body and pollutant may  
7 have been placed on the 303(d) list in the absence of any evidence of an exceedance of the water  
8 quality standard or objective for that pollutant or that the water body is otherwise impaired as a  
9 result of that pollutant. In fact, a waterbody was allowed to be listed just because the water quality  
10 is "of such concern that the Regional Water Board determines the waterbody needs to be afforded a  
11 level of protection offered by a 303(d) listing." See 1998 Clean Water Act Section 303(d) Listing  
12 Guidelines for California (August 11, 1997) at p. 3, para. B.6. Thus, the State's listing may have  
13 been *completely independent* of any finding of an actual impairment of water quality and should not  
14 be used as a basis for imposing mass limits.<sup>22</sup>

15 Although effluent restrictions are presumably intended to benefit water quality and the  
16 environment, the evidence shows that such benefits will not be realized. POTWs contribute only a  
17 small percentage of the total pollutant loading to the Bay of toxic pollutants listed on the 303(d) list  
18 (including mercury). See Bay Area Regional Water Board's 2006 Mercury TMDL Report. Public  
19 clean water agencies' contribution to the input of mercury to the Bay, and any corresponding  
20 reduction sought in the TMDL is extremely small. Municipal wastewater results in 18 kg/yr out of  
21 the 1222 kg/yr total annual loading from all sources. This is less than one-tenth of one percent

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23 <sup>20</sup> The Basin Plan reiterates that "by considering pollutant influx from all sources, wasteload allocation [WLA] supports  
24 the identification and implementation of the most effective and economically efficient means of achieving water quality  
objectives in the larger Estuary system." Basin Plan at 4-2.

25 <sup>21</sup> See Water Quality-based Approach to Pollution Control described in Chapter 7 of EPA's Water Quality Standards  
26 Handbook (1994); see also 54 Fed. Reg. 23879 (1989) ("Pursuant to section 303(c) of the CWA, states adopt water  
27 quality standards, and then, under section 303(d), develop total maximum daily loads (TMDLs), for water quality-  
limited segments, to attain and maintain the water quality standards.... This process results in effluent limits that protect  
aquatic life and human health because the limits are derived from water quality standards.")

28 <sup>22</sup> Although the State Board has adopted new listing criteria, it is not clear that all listed waters have been thoroughly  
reanalyzed under the new criteria for listing and delisting and may remain on the list as remnants of the broader  
previous listing process.



1 (.01%) of the total loading. *See* approved Basin Plan Amendment adopting Mercury TMDL at pg.  
2 BPA-9; *see also* State Board Res. 2007-0045. Imposing mass limits for mercury does not solve the  
3 problem, but merely unfairly targets point sources covered by permits and increases the regulatory  
4 burden on public agencies that have already stepped up to the plate to help with mercury reduction  
5 efforts voluntarily.<sup>23</sup>

6       Allowing normal economic growth and development to occur in WCA's service area in the  
7 interim until the TMDL is finalized would not result in any appreciable degradation in water  
8 quality. Furthermore, completely eliminating WCA's discharge to the Bay would not result in any  
9 measurable or significant improvement in water quality.<sup>24</sup> Therefore, regulation of this *de minimis*  
10 source is not reasonable and is likely not required. *See Ober v. USEPA*, 243 F.3d 1190 (9th Cir.  
11 2001)("de minimis exception is allowed for regulation yielding trivial gain"; thus, regulators have  
12 "the authority to exempt from regulation those source categories in the area which contribute only  
13 negligibly to ambient concentrations which exceed [standards].")

14       The requirements to limit the *de minimis* mass inputs of mercury to current levels in the  
15 Permit<sup>25</sup> and subsequent permits will more likely impede, rather than facilitate, improvements in  
16 water quality. By causing significant public resources to be expended on projects to meet stringent  
17 limits that do little to improve water quality, fewer resources will be available for projects that

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20  
21 <sup>23</sup> Recent scientific literature indicates that "...loadings to water in the San Francisco Bay Estuary are dominated by  
22 runoff from the Central Valley catchment and remobilization of contaminated sediments deposited during past mining  
activities." Macleod ES&T, vol.39, No.17, 2005. Many BACWA members have mercury source control programs that  
include dental amalgam programs and/or fluorescent bulb and thermometer exchange programs.

23 <sup>24</sup> The total removal of this discharge would make no measurable change in the mercury levels in fish. "[W]hat matters  
24 is not the [water]'s current status, but whether the proposed discharge will have a detectable effect on that status."  
*Arkansas v. Oklahoma*, 503 U.S. 93 (1992).

25 <sup>25</sup> *See* Permit IV.B, pg. 14 ("Until TMDL and waste load allocation (WLA) efforts for mercury and selenium provide  
26 enough information to establish a different WQBEL, the Discharger shall demonstrate that the current mercury and  
27 selenium mass loadings to the receiving water do not increase..."). Incidentally, the Regional Board's assertion in  
previous Orders (*e.g.*, Order No. 01-105) that the State's anti-degradation policy (Resolution 68-16) necessitates the  
28 imposition of effluent limitations for constituents found on the State's 303(d) list in order to prevent further degradation  
of a particular water body is faulty. Resolution 68-16 applies to "high quality waters" (*i.e.*, whenever the existing  
quality of water is better than the quality established in policies as of the date on which such policies became effective)  
and therefore, does not apply to discharges of constituents for which the receiving water has been determined to be  
impaired.

1 would actually provide demonstrable improvements in water quality. Such projects will  
2 presumably be identified as a part of the TMDL development process.

3 The imposition of permit restrictions on WCA's *de minimis* discharge of 303(d)-listed  
4 pollutants (i.e., mercury) prior to the implementation of a TMDL, and in the absence of a clearly  
5 articulated legal, scientific or technical basis, constituted a prejudicial abuse of discretion by  
6 violating the Basin Plan, the California Water Code, and the CWA.

7 3) The Regional Board Abused its Discretion by Imposing Both  
8 Interim Concentration and Mass Limits on Mercury.

9 Effluent limitations can be expressed numerically in terms of concentration (*i.e.*, milligrams  
10 per liter) or mass (*i.e.*, pounds per day). Federal regulations provide guidance on when to impose  
11 which type of effluent limit by stating, in part, that "[a]ll pollutants in permits shall have limitations,  
12 standards or prohibitions expressed in terms of mass EXCEPT . . . when applicable standards and  
13 limitations are expressed in terms of other units of measurement. . . ." 40 C.F.R. §122.45(f)(1)  
14 (emphasis added). Thus, if water quality standards are based upon concentration, mass limits are  
15 not required. *Id.*

16 Despite this clear exception to the requirement for mass limits, the Permit contains both  
17 mass and concentration effluent limits for mercury. Requiring dual effluent limits (mass and  
18 concentration) for the same constituent amounts to a "double ding" in any potential enforcement  
19 action, in that an exceedance of a concentration effluent limit may also result in exceedance of the  
20 mass limit. Thus, the imposition of mass limits, in addition to concentration limits, unnecessarily  
21 exposes these permit holders to additional enforcement actions and mandatory minimum penalties.

22 Mass limits, in addition to concentration limits, are redundant as mass limits are always  
23 implied in POTW permits because of inherent constraints related to a treatment plant's design  
24 capacity or maximum flows. In this case, the Permit specifically prohibits exceeding the average  
25 dry weather flow rate of 15.7 mgd for the West County Wastewater District treatment plant and 16  
26 mgd for the Richmond treatment plant, for which the facilities were designed. *See* Permit at page  
27 10, para. III.D. The combination of a flow restriction and a concentration restriction is equivalent to  
28

1 a mass restriction. Thus, there is no need to explicitly require mass limits in the Permit since the  
2 two components of mass (flow and concentration) are already explicitly limited.

3 Furthermore, performance-based mass limits are particularly troublesome for POTWs as  
4 such limits may unjustifiably restrict future growth and economic development in the POTW  
5 service area. Such restrictions contradict the Basin Plan's mandate that "control measures  
6 employed must be sufficiently flexible to accommodate future changes in technology, population  
7 growth, land development, and legal requirements." Basin Plan at 4-7 (emphasis added). By  
8 imposing mass limits without considering the need for population growth and land development  
9 within WCA's service area, the Regional Board violated the Basin Plan, and failed to comply with  
10 Water Code §13263(a) when imposing mass limits which are not required when a concentration  
11 limit is imposed. 40 C.F.R. §122.44(f).

12 By imposing duplicative mass limits, the Regional Board has regulated beyond the  
13 requirements of federal law and must, therefore, consider the requirements set forth in Water Code  
14 section 13263(a), including a consideration of economics and the need for developing housing  
15 within particular regions pursuant to Water Code §13241, prior to imposing such growth restricting  
16 limits upon POTWs. *See City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613,  
17 618 (2005). For each of these reasons, the Regional Board violated state law and committed a  
18 prejudicial abuse of discretion by including or sanctioning both mass and concentration limits. For  
19 these reasons, the State Board should remand the Permit to remove the mass limits on mercury.

20 **D. The Regional Board Improperly Included Daily Maximum Effluent**  
21 **Limitations.**

22 Where effluent limitations are authorized, federal regulations provide that for  
23 discharges from POTWs, all permit effluent limits shall, unless impracticable, be stated as average  
24 weekly and average monthly discharge limitations.<sup>26</sup> 40 C.F.R. § 122.45(d)(2). The Permit  
25 contains several unsupported daily maximum limits, including, among others, the limits for mercury  
26 and dioxin-TEQ. *See* Permit at pg. 11.

27  
28 <sup>26</sup> Federal regulations also provide that for discharges from all dischargers other than POTWs, the effluent limitations  
shall be stated as maximum daily and average monthly discharge limitations. 40 C.F.R. §122.45(d)(1).

1 EPA's regulations state that: "For continuous discharges all permit effluent limitations,  
2 standards, and prohibitions, including those necessary to achieve water quality standards shall  
3 unless impracticable be stated as maximum daily and average monthly discharge limitations for all  
4 discharges other than publicly owned treatment works." C.F.R. § 122.45(d)(1). This regulation is  
5 not applicable to this Permit because the discharges are from publicly owned treatment works. The  
6 applicable regulation states that, "average weekly and average monthly discharge limitations  
7 [apply] for POTWs," 40 C.F.R. §122.45(d)(2).

8 The State Implementation Policy (SIP) did not change the federal requirements. In enacting  
9 the SIP, the State Board may have attempted to modify the federal regulatory prohibition on the use  
10 of daily maximum limits for POTWs by stating: "For this method only [referring to limits for  
11 aquatic life protection] maximum daily effluent limitations shall be used for publicly-owned  
12 treatment works (POTWs) in place of average weekly limitations." SIP at 8, §1.4. However, prior  
13 to authorizing the use of daily maximum limitations in POTW permits for compliance with aquatic  
14 life criteria in the SIP, the State Board did not make the required demonstration that the imposition  
15 of average weekly and average monthly effluent limitations for the protection of aquatic life was  
16 "impracticable" per the requirements of 40 C.F.R. §122.45(d). Therefore, the State Board's  
17 authorization of daily maximum limitations for compliance with aquatic life criteria does not meet  
18 federal requirements or California Water Code Chapter 5.5 requirements for consistency with  
19 federal requirements. As such, the Regional Board should remove all daily maximum interim and  
20 final effluent limitations based on aquatic life criteria.

21 Further, the State Board did not include in the SIP the same language purportedly allowing  
22 for the inclusion of daily maximum limitations in POTW permits for effluent limitations based upon  
23 technological requirements (for conventional pollutants) or upon human health criteria. Therefore,  
24 even if the SIP provisions pertaining to maximum daily limits for aquatic life criteria were valid, 40  
25 C.F.R. §122.45(d) requires the Regional Board to remove all daily maximum interim and final  
26 effluent limitations based on human health criteria or technological requirements.

1 The Permit never specifies why monthly and weekly average limits are impracticable. In  
2 fact, there is no record in the Permit of an impracticability analysis and no evidence in support of  
3 imposing maximum daily limits.<sup>27</sup>

4 Therefore, the Regional Board's inclusion of daily maximum effluent limitations in the  
5 Permit, without a specific, pollutant-by-pollutant impracticability analysis, violated 40 C.F.R.  
6 §122.45(d)(2) and Water Code Chapter 5.5. By violating federal and state law, the Regional Board  
7 proceeded without, or in excess of, its jurisdiction and has committed a prejudicial abuse of  
8 discretion by not proceeding in a manner required by law. For these reasons, the State Board should  
9 direct the Regional Board to remove the daily maximum effluent limitations not properly analyzed  
10 for impracticability. *See accord* SWRCB Order No. 2002-0012 at pg. 20-21 (July 18, 2002) ("the  
11 Regional Board must include a finding in the permit on remand explaining the impracticability of  
12 weekly average limits."); SWRCB Order No. 2002-0015 at pg. 56; *City of Woodland v. Regional*  
13 *Water Quality Control Board for the Central Valley Region, and SWRCB*, Case No. RG04-188200,  
14 Statement of Decision at pg. 20.

15 **E. The Regional Board Improperly Imposed Compliance Schedule Action**  
16 **Plans in the Permit and in the CDO which are Overly Stringent.**

17 BACWA is concerned that having stringent schedules contained in the Permit and CDO  
18 will eventually require the construction of capital facilities when BACWA has repeatedly been told  
19 that building additional treatment is not the expected direction of the Bay Area water quality  
20 program. BACWA was under the impression that the direction was to pursue regulatory  
21 alternatives, such as TMDLs, site specific objectives, and pollution prevention (as described in the  
22 implementation plan for the mercury TMDL). The Permit and CDO veer way off of this intended  
23 direction.

24  
25 <sup>27</sup> The Regional Board has stated in other permits that MDELs are used to protect against acute water quality effects,  
26 and that MDELs are necessary for preventing fish kills or mortality to aquatic organisms. *See e.g.* Regional Board Order  
27 No. R2-2007-0075 at pg. F-18, para. C.1.c. However, these statements are not included in this Permit, do not constitute  
28 an impracticability analysis, and are inadequate to justify daily limits as there is no evidence to support such generic  
findings. Furthermore, at most, these justifications would address only limits based on acute aquatic life criteria.  
However, the Regional Board did not include limits based on acute aquatic life protection, rather, the limits for mercury  
and dioxin-TEQ are based on long-term chronic exposure. *See In the Matter of the Own Motion Review of the City of*  
*Woodland, SWRCB Order No. WQ 2004-0010* (holding that "implementing the limits as instantaneous maximums  
appears to be incorrect because the criteria guidance value . . . is intended to protect against chronic effects.")

1 Also, this Permit and CDO contain compliance schedules for constituents that have been  
2 banned for use, cannot be source controlled, or for which wastewater treatment plant effluents  
3 have been identified as non-significant sources. *See* Permit at pgs. 25-26, CDO at pgs. 6-9.  
4 Additionally, each constituent is already being addressed through an alternative regulatory strategy  
5 that will appropriately resolve beneficial use concerns for the San Francisco Bay. The compliance  
6 schedules in the Permit and/or CDO are overly burdensome for every constituent, as specified  
7 below:

8 1) Dioxin-TEQ. The Permit's and CDO's compliance schedule for dioxin-TEQ is overly  
9 burdensome. The dioxin congeners found in fish tissue samples, which form the basis for the  
10 dioxin 303(d) listing, are different than the congeners detected in publicly-owner treatment works.  
11 Given that the sources of dioxin are uncontrollable by municipal wastewater treatment plants and  
12 are primarily introduced through air deposition, the compliance requirements for dioxin reduction  
13 in the effluent will have little, if any, environmental benefit to reduce the concentrations of dioxin  
14 congeners found in fish tissue. Thus, a *de minimis* exception should be granted in this case at least  
15 until the TMDL is finalized. *See Ober v. USEPA*, 243 F.3d 1190, 1195 (9th Cir. 2001) ("de  
16 minimis exception is allowed for regulation yielding trivial gain.").

17 2) 4,4-DDD and Heptachlor. These pesticides were been banned for use in the United  
18 States many years ago. In fact, the pesticides have been banned in many other countries around  
19 the world as well. Thus, to include them in the lengthy and costly list of actions for the wastewater  
20 treatment facilities in the Permit and CDO is an irresponsible use of public resources.

21 3) Cyanide. The Regional Water Board has adopted a site-specific objective for cyanide  
22 that will result in appropriate water quality objectives that are protective, technically feasible, and  
23 reasonable. Approval of the cyanide site-specific objective by the State Water Board, which must  
24 happen before approval by the Office of Administrative Law and USEPA, is currently stalled  
25 because the State Water Board staff has been pulled to work on other initiatives. Cyanide is *not* a  
26 significant water quality issue for San Francisco Bay, yet the CDO requires significant outlay of  
27 public funds on all kinds of activities to reduce cyanide from municipal wastewater effluent.  
28 These requirements are a waste of public resources.

1           4) Selenium. BACWA is concerned that the activities being required in the CDO for  
2 selenium are inappropriate because a TMDL for selenium will be developed in the future.  
3 Therefore, significant studies and capital improvements are premature for this municipal  
4 discharger. *See Communities for a Better Environment v. SWRCB*, 109 Cal.App.4th at 1105-1108.  
5 In addition, quality control for sampling and analysis should be investigated first and further  
6 actions taken only if warranted.

7           For these reasons, the action plans in the Permit and/or CDO should be revised to remove  
8 all activities related to installation of capital improvements. In addition, any pollution prevention  
9 activities should be identical to resolutions or orders already adopted by the Regional Board for  
10 specific constituents. No new or different activities should be required for these constituents.

11           **F. The Regional Board Improperly Imposed a Schedule with Enforceable**  
12 **Deadlines to Minimize Blending.**

13           Currently, WCA's exercise of the well established practice of blending during peak  
14 wet weather flows ensures compliance with the CWA. In order to comply with the compliance  
15 schedule imposed by the Regional Board to minimize blending, WCA is required to complete  
16 improvements to the facility pursuant to deadlines in a workplan to be submitted to the Regional  
17 Board for approval by July 1, 2009. *See* Permit at VI.C.6. at pg. 25. By including a compliance  
18 schedule with enforceable deadlines to minimize blending, the Regional Board violated federal and  
19 state law.

20           1) **Inclusion of a Compliance Schedule with Enforceable Deadlines to Minimize**  
21 **Blending in the Permit Violates Applicable Federal Law.**

22           The inclusion of a compliance schedule to minimize blending is contrary to federal and  
23 state law and not based on evidence in the record. The Regional Board incorrectly determined that  
24 WCA's blending practice constituted an illegal "bypass" in violation of 40 C.F.R. §122.41(m). *See*  
25 Permit at pg. F-13, para. A.3. The requirements of 40 C.F.R. §122.41(m) do not apply where  
26 the bypass does not cause effluent limitations to be exceeded as long as a POTW could show that  
27 such bypass is "for essential maintenance to assure efficient operation." *See* 40 C.F.R.  
28 §122.41(m)(2). This regulation does not prohibit operation of treatment facilities in a manner

1 consistent with the design of a facility and does not prohibit blending which is consistent with the  
2 design of a facility. *See* 40 C.F.R. §122.41(m)(2).

3 On occasions, during peak wet weather flows, WCA blends primary treated effluent with  
4 secondary treated effluent prior to disinfection and discharge to Central San Francisco Bay. *See*  
5 Permit at pg. 5. This well established practice is essential to assure efficient operation of WCA's  
6 treatment facilities during peak wet weather. Also, in all previous permits adopted by the Regional  
7 Board, the Regional Board staff recognized that the practice of blending contemplated by the  
8 WCA's engineering design was reasonable and lawful. Thus, the Regional Board is acting  
9 contrary to 40 C.F.R. §122.41(m).

10 2) Inclusion of a Compliance Schedule with Enforceable Deadlines to  
11 Minimize Blending in the Permit Violates Applicable State Law.

12 Water Code section 13360 prohibits the State from dictating the design of treatment  
13 facilities or the particular manner in which compliance is achieved. Water Code §13360 ("No  
14 waste discharge requirement or other order of a regional board or the state board or decree of a  
15 court ... shall specify the design, location, type of construction, or particular manner in which  
16 compliance may be had with that requirement, order, or decree.")

17 By requiring that WCA minimize blending by imposing a compliance schedule in the  
18 Permit that dictates a re-design of the treatment facility, the Regional Board violated Water Code  
19 §13360. *See* Permit at Section VI.C.6, pg. 25.

20 Furthermore, since minimizing blending is not dictated by federal law, the Regional Board  
21 failed to comply with the requirements of Cal. Water Code §13263(a), which requires  
22 consideration of several factors including those contained in Cal. Water Code §13241 when  
23 adopting compliance schedules for minimizing blending into this Permit. Some of the factors the  
24 Regional Board failed to take into consideration when imposing this requirement include economic  
25 effects of the requirement, the level of water quality that could reasonably be achieved through the  
26 coordinated control of all factors which affect water quality in the area, and the need for  
27 developing housing within the region. *See* Cal. Water Code §13241.



1                   3)     The Regional Board should not be Imposing a Compliance Schedule with  
2                             Enforceable Deadlines to Minimize Blending Before Clear Guidance Is  
3                             Issued from the EPA.

4             The inclusion of a compliance schedule to minimize blending is a result of  
5     misinterpretation and misapplication of evolving guidance from U.S. EPA on the circumstances  
6     under which blending is appropriate. In particular, correspondence from the U.S. EPA to members  
7     of Congress in March of 2001, presenting the "current thinking" of U.S. EPA, indicated that  
8     blending is appropriate and permissible where certain conditions are satisfied. Blending at WCA  
9     facilities meets all of the specific criteria, and there is uncontroverted testimony in the record that  
10    the design of the project is based on generally accepted engineering practices and criteria.

11           Also, the EPA and the Office of Management and Budget are still reviewing the current  
12    version of a national blending policy. Notably, the EPA has not yet issued a final draft due to the  
13    controversy surrounding the prohibition on blending. Furthermore, BACWA does not believe that  
14    it is national or state policy that a No Feasible Alternatives Analysis (NFAA) be followed up by an  
15    enforcement schedule which may carry penalties. First, the regulation cited, 40 C.F.R.  
16    §122.41(m), to require the development of a NFAA, does not require that an enforceable schedule  
17    be then placed in the Permit. Second, requirements in this region should not be developed on a  
18    permit by permit bases, in advance of how these significant issues are settled nationally.

19           Furthermore, WCA may incur substantial immediate and irreparable harm if it is required  
20    to immediately comply with the Permit's compliance schedule to minimize blending. The Permit  
21    established an enforceable compliance schedule requiring WCA to design and construct facilities  
22    to minimize blending. *See* Permit at VI.C.6, pg. 25. Public expenditures for such design and  
23    construction may represent a waste of scarce public funds because there are no identified water  
24    quality benefits or standards associated with minimizing blending.

25     **5.     THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:**

26           The Permit and CDO include requirements, challenged herein, which are unreasonable,  
27    contrary to legal requirements, and not supported by the findings and evidence in the administrative  
28    record. The limits for mercury and dioxin-TEQ are unreasonable because WCA has extremely  
   limited control over influent sources. Further, these requirements could ultimately impose

1 considerable costs on the agency's ratepayers for potential mandatory and discretionary penalties  
2 imposed for non-compliance with the challenged requirements, or for construction of additional  
3 treatment units to meet limits imposed without a demonstration that such requirements would result  
4 in material improvements in the water quality of the Bay. In fact, such expenditures could have a  
5 negative impact on water quality, by diverting limited public funds away from other projects that  
6 might have a higher potential for improvements in water quality.

7 BACWA is aggrieved by unreasonable permit prohibitions that may put WCA in non-  
8 compliance with the Permit and CDO. BACWA's membership will be aggrieved by any permit  
9 provisions that cannot now or in the future be met as federal and state law provide harsh sanctions  
10 for non-compliance with effluent limitations in a wastewater discharge permit. For example,  
11 California Water Code § 13385 prescribes mandatory minimum penalties of \$3,000 per day per  
12 violation, with narrow exceptions. With this statute, the State has no latitude to excuse  
13 noncompliance with the Permit.

14 Other statutory provisions, while not setting mandatory minimum penalties, create even  
15 greater exposure for BACWA's members. The CWA authorizes civil penalties of up to \$32,500 per  
16 day per violation, 33 U.S.C. § 1319(d), and also authorizes criminal penalties, including the  
17 incarceration of public officials, for knowing or negligent permit violations. 33 U.S.C. § 1319(c); *see*  
18 *U.S. v. Weitzenhoff*, 35 F.3d 1275 (9<sup>th</sup> Cir. 1994) (managers of treatment plant convicted of permit  
19 violations). In addition to enforcement by administrative agencies, private parties can seek civil  
20 penalties pursuant to the "citizen suit" provisions of the CWA. *See* 33 U.S.C. § 1365.

21 Likewise, California's Porter-Cologne Water Quality Act contains stiff penalties for  
22 violation of effluent limitations in a wastewater discharge permit. *See* Cal. Water Code §§ 13385  
23 and 13387. This act authorizes a penalty of up to \$25,000 per day per violation, with additional  
24 liability not to exceed \$25 per gallon if the discharge is to navigable waters of the United States and  
25 either is "not susceptible to cleanup or is not cleaned up." Cal. Water Code § 13385(b)(1)-(2), (d).  
26 The act also establishes criminal liability for intentional or negligent violation of effluent limitations  
27 contained within a permit. Cal. Water Code § 13387(a)-(d).

Furthermore, the application of illegal or unreasonable effluent limitations in violation of federal and state law causes substantial harm to BACWA and its members that have a vested interest in complying with the law. This appeal furthers one of BACWA's express purposes, which is "to represent the interests of the Agency or one or more Member Agencies, including, without limiting the generality of the foregoing, by participating in the appeal of or court challenge of the issuance or denial of issuance of NPDES permits or the adoption or amendment of water quality orders, regulations or decisions."

**6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS:**

Petitioner seeks an Order by the State Board that will remand Order No. R2-2008-0003 and R2-2008-0004 to the Regional Board for revisions and will direct the Regional Board to:

- A. Remove the numeric effluent limits for dioxin-TEQ;
- B. Remove the final effluent limits for mercury;
- C. Remove the mass limit for mercury;
- D. Remove daily maximum effluent limitations where the Regional Board failed to conduct an impracticability analysis.
- E. Revise the compliance schedule action plans for dioxin-TEQ, 4,4-DDD, heptachlor, cyanide, and selenium to (1) remove all activities related to installation of capital improvements and (2) ensure that any pollution prevention activities are identical to resolutions or orders already adopted by the Regional Water Board; and
- F. Remove the compliance schedule for minimizing blending.

**7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:**

BACWA's preliminary statement of points and authorities is set forth in Section 4 above. Nevertheless, BACWA reserves the right to supplement this statement upon receipt and review of the administrative record.

In Section 4, BACWA asserts that provisions of the Permit and CDO are inconsistent with the law and otherwise inappropriate for various reasons, including: failure to comply with the

Porter-Cologne Water Quality Control Act (Cal. Water Code, §§ 13000 *et seq.*); failure to comply with the CEQA (Cal. Public Resources Code, §§ 21000 *et seq.*, and 23 C.C.R. § 3733); failure to comply with the APA (Cal. Gov't Code, §§ 11340 *et seq.*); inconsistency with the Water Quality Control Plan, San Francisco Bay Region (Basin Plan); inconsistency with the Clean Water Act (33 U.S.C. §§ 1251 *et seq.*) and its implementing regulations (40 C.F.R. Parts 122, 123, 130, and 131); inconsistency with EPA guidance (EPA's Water Quality Standards Handbook (1994, 3<sup>d</sup> edition)); absence of findings supporting the provisions of the Order; Regional Board findings that are not supported by the evidence; and other grounds that may be or have been asserted by Petitioner.

**8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD AND TO THE DISCHARGER:**

A true and correct copy of this Petition was mailed by First Class mail on February 29, 2008, to the Discharger, and to the Regional Board at the following address:

Bruce Wolfe, Executive Officer  
California Regional Water Quality Control Board,  
San Francisco Region  
1515 Clay Street, Suite 1400  
Oakland, California 94612

**9. A STATEMENT THAT THE SUBSTANTIVE ISSUES AND OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN EXPLANATION WHY NOT:**

The substantive issues and objections were raised before the Regional Board either in this permitting action, or in previous permitting actions that were appealed to the State Board and remain in abeyance. The issues raised in the previous Petition that remain at issue were reiterated and incorporated into this Petition.

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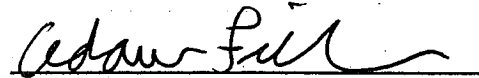
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1 **10. PETITIONER'S REQUEST FOR ABEYANCE:**

2 BACWA requests that the State Board place its Petition for Review in abeyance pursuant to  
3 23 C.C.R. §2050.5(d) to allow time for BACWA to attempt to resolve its concerns with the  
4 Regional Board informally.

5  
6  
7 DATED: February 29, 2008

Respectfully submitted,

8  
9 

10 Adam Friedman  
11 DOWNEY BRAND LLP  
12 BACWA Special Counsel  
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EXHIBIT A



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger  
Governor

**ORDER NO. R2-2008-0003**

**NPDES NO. CA0038539**

The following Dischargers are authorized to discharge in accordance with the conditions set forth in this Order.

**Table 1. Discharger Information**

<b>Dischargers</b>	1. West County Agency (WCA), including its member agencies listed below: 2. West County Wastewater District (WCWD), 3. City of Richmond 4. Richmond Municipal Sewer District No.1
<b>Name of Facilities</b>	1. West County Agency Common Outfall 2. WCWD Treatment Plant and Its Collection System, and 3. RMSD Water Pollution Control Plant and Its Collection System
<b>Facility 1 Address</b>	West County Agency (mailing address) 2910 Hilltop Drive Richmond, CA 94806
<b>Facility 2 Address</b>	West County Wastewater District Treatment Plant 2377 Garden Tract Road Richmond, CA 94801
<b>Facility 3 Address</b>	RMSD Water Pollution Control Plant 601 Canal Boulevard Richmond, CA 94804
The U.S. Environmental Agency (USEPA) and the Regional Water Quality Control Board have classified this discharge as a major discharge.	

The discharge by the above listed Dischargers from the discharge point identified below is subject to waste discharge requirements as set forth in this Order:

**Table 2. Discharge Location**

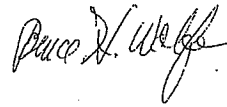
Discharge Point	Effluent Description	Discharge Point Latitude	Discharge Point Longitude	Receiving Water
001	Secondary treated POTW effluent	37° 54' 47" N	122° 25' 06" W	Central San Francisco Bay

**Table 3. Administrative Information**

This Order was adopted by the Regional Water Board on:	January 30, 2008
This Order shall become effective on:	April 1, 2008
This Order shall expire on:	March 31, 2013
The Dischargers shall file a Report of Waste Discharge in accordance with title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than:	180 days prior to the Order expiration date

West County Agency  
ORDER NO. R2-2008-0003  
NPDES NO. CA0038539

I, Bruce H. Wolfe, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on January 30, 2008.



Digitally signed  
by Bruce Wolfe  
Date: 2008.02.06  
21:56:40 -08'00'

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Bruce H. Wolfe, Executive Officer



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## I. FACILITY INFORMATION

The following Dischargers are subject to waste discharge requirements as set forth in this Order:

**Table 4. Facility Information**

<b>Dischargers</b>	1. West County Agency (WCA), including its member agencies 2. West County Wastewater District (WCWD), and 3. City of Richmond 4. Richmond Municipal Sewer District No.1 (RMSD)		
<b>Name of Facilities</b>	1. West County Agency Common Outfall 2. WCWD Treatment Plant and Its Collection System, 3. RMSD Water Pollution Control Plant and Its Collection System		
<b>Facility Addresses</b>	1.2910 Hilltop Drive Richmond, CA 94806 Contra Costa County	2. 2377 Garden Tract Road Richmond, CA 94801 Contra Costa County	3. 601 Canal Boulevard Richmond, CA 94804 Contra Costa County
<b>Facility Contacts, Titles, and Phones</b>	1&2. E.J. Shalaby, WCA Manager, 510-222-6700 3. Rich Davidson, City Engineer and contact for RMSD, 510-307-8105		
<b>Mailing Addresses</b>	1.2910 Hilltop Drive Richmond, CA 94806 Contra Costa County	2. 2910 Hilltop Drive Richmond, CA 94806 Contra Costa County	3. 1401 Marina Way S. Richmond, CA 94804 Contra Costa County
<b>Type of Facilities</b>	Publicly Owned Treatment Plant (POTW)		
<b>Facility Design Flows</b>	2. 12.5 MGD dry weather capacity 21 MGD wet weather capacity 3. 16 MGD dry weather capacity 20 MGD wet weather capacity		

## II. FINDINGS

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Regional Water Board), finds:

**A. Background.** West County Agency (WCA), a Joint Powers Agency whose members are (1) West County Wastewater District (WCWD), (2) the City of Richmond, and (3) Richmond Municipal Sewer District No.1 (RMSD), is currently discharging under Order No. 01-144 and National Pollutant Discharge Elimination System (NPDES) Permit No. CA0038539. WCA and its three member agencies are hereinafter referred to as Dischargers. The Dischargers submitted a Report of Waste Discharge, dated May 3, 2006, and applied for an NPDES permit reissuance to discharge treated wastewater to Central San Francisco Bay, a water of the United States, via a submerged diffuser.

**B. Facility Description.** This permit regulates two separate wastewater treatment plants that combine their treated effluent prior to discharge. The locations of the treatment plants and the combined outfall are shown in Attachment B. WCWD owns and operates a plant at 2377 Garden Tract Road in Richmond. This plant serves a population of about 90,000 covering parts of Richmond, the City of San Pablo, the communities of Tara Hills, Rollingwood, Bayview, El Sobrante, the Crestview portion of Pinole, and some unincorporated portions of Contra Costa County. It has a design flow rate of 12.5 million gallons per day (MGD) during dry weather, but it has a hydraulic capacity of 21 MGD during wet weather conditions. The average daily flow rate in 2006 was approximately 9.8 MGD.

The City of Richmond and RMSD own and operate the RMSD Water Pollution Control Plant (Richmond plant) at 601 Canal Boulevard in Richmond. RMSD was formed to facilitate allocation of tax money from residents in the area of Richmond covered by this District, but it has no employees and it is operated by the City of Richmond. This plant serves a population of about 68,000 covering most of the incorporated area of Richmond. It has a design flow rate of 16 MGD during dry weather, but it has a hydraulic capacity of 20 MGD during wet weather conditions. The average daily flow rate in 2006 was about 8.5 MGD. Effluent from the WCWD plant and the Richmond plant are combined prior to discharge from the West County Agency Common Outfall into San Francisco Bay.

WCWD and RMSD independently own and operate their treatment plants and the sanitary sewer collection systems within their separate service areas. WCWD has about 249 miles of gravity sewer and 11 miles of force main with 17 pump stations. RMSD has about 187 miles of sewer line with 12 pump stations.

The wastewater treatment processes at the WCWD plant consist of bar screens, an aerated grit chamber, primary clarifiers, a roughing filter, aeration basins, secondary clarifiers, and chlorine contact basins. The wastewater treatment processes at the Richmond plant consist of bar screens, grit removal chambers, primary clarifiers, activated sludge basins, secondary clarifiers, and chlorine contact basins. Flow diagrams for both the WCWD plant and the Richmond plant are shown in Attachment C. Treated wastewater from the WCWD plant is transported to the Richmond plant for dechlorination and discharge. The treated wastewater from the Richmond plant is combined with the effluent from the WCWD plant where it is dechlorinated and then discharged through WCA's combined deep-water outfall into central San Francisco Bay.

Wet weather conditions sometime exceed the secondary treatment capacity at the Richmond plant due to infiltration into the collection systems. Under these conditions, the excess primary-treated flows are diverted around the biological treatment units to wet weather storage. Once storage is at capacity, excess primary-treated flows are blended with the secondary-treated wastewater. The combined flow is disinfected and dechlorinated prior to discharge to the Bay. The stored wastewater is treated through the secondary treatment units after wet weather flows subside and there is capacity in those units.

- C. Legal Authorities.** This Order is issued pursuant to section 402 of the federal Clean Water Act (CWA) and implementing regulations adopted by the U.S. Environmental Protection Agency (USEPA) and chapter 5.5, division 7 of the California Water Code (commencing with section 13370). It shall serve as a NPDES permit for point source discharges from this facility to surface waters. This Order also serves as Waste Discharge Requirements (WDRs) pursuant to article 4, chapter 4, division 7 of the Water Code (commencing with section 13260).
- D. Background and Rationale for Requirements.** The Regional Water Board developed the requirements in this Order based on information submitted as part of the application, through monitoring and reporting programs, and other available information. The Fact Sheet (Attachment F), which contains background information and rationale for Order requirements, is hereby incorporated into this Order and constitutes part of the Findings for this Order. Attachments A through E and G through H are also incorporated into this Order.

- E. California Environmental Quality Act (CEQA).** Under Water Code section 13389, this action to adopt an NPDES permit is exempt from the provisions of CEQA, Public Resources Code sections 21100-21177.
- F. Technology-Based Effluent Limitations.** Section 301(b) of the CWA and implementing USEPA permit regulations at section 122.44, title 40 of the Code of Federal Regulations<sup>1</sup>, require that permits include conditions meeting applicable technology-based requirements at a minimum, and any more stringent effluent limitations necessary to meet applicable water quality standards. The discharge authorized by this Order must meet minimum federal technology-based requirements based on Secondary Treatment Standards at 40 CFR, Part 133. A detailed discussion of the technology-based effluent limitations development is included in the Fact Sheet (Attachment F).
- G. Water Quality-based Effluent Limitations.** Section 301(b) of the CWA and section 122.44(d) require that permits include limitations more stringent than applicable federal technology-based requirements where necessary to achieve applicable water quality standards. [This Order contains requirements, expressed as a technology equivalence requirement, more stringent than secondary treatment requirements that are necessary to meet applicable water quality standards. The rationale for these requirements, which consist of equivalent requirements or other provisions, is discussed in the Fact Sheet (Attachment F).]

Section 122.44(d)(1)(i) mandates that permits include effluent limitations for all pollutants that are or may be discharged at levels that have the reasonable potential to cause or contribute to an exceedance of a water quality standard, including numeric and narrative objectives within a standard. Where reasonable potential has been established for a pollutant, but there is no numeric criterion or objective for the pollutant, water quality-based effluent limitations (WQBELs) must be established using: (1) USEPA criteria guidance under CWA section 304(a), supplemented where necessary by other relevant information; (2) an indicator parameter for the pollutant of concern; or (3) a calculated numeric water quality criterion, such as a proposed state criterion or policy interpreting the state's narrative criterion, supplemented with other relevant information, as provided in section 122.44(d)(1)(vi).

- H. Water Quality Control Plans.** The Regional Water Board adopted a Water Quality Control Plan for the San Francisco Bay Basin (hereinafter Basin Plan) that designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for all waters addressed through the plan. In addition, the Basin Plan implements State Water Resources Control Board (State Water Board) Resolution No. 88-63, which established state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. Because of the marine influence on receiving waters of San Francisco Bay, total dissolved solids levels in the Bay commonly (and often significantly) exceed 3000 mg/L and thereby meet an exemption to State Water Board Resolution No. 88-63. Therefore, the MUN designation is not applicable to Central San Francisco Bay. Beneficial uses applicable to Central San Francisco Bay are as follows:

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<sup>1</sup> All further statutory references are to title 40 of the Code of Federal Regulations unless otherwise indicated.

**Table 5. Basin Plan Beneficial Uses of Central San Francisco Bay**

Discharge Point	Receiving Water Name	Beneficial Use(s)
E-001-DC	Central San Francisco Bay	Ocean Commercial and Sport Fishing (COMM) Estuarine Habitat (EST) Industrial Service Supply (IND) Fish Migration (MIGR), Navigation (NAV) Industrial Process Water Supply (PROC) Preservation of Rare and Endangered Species (RARE) Water Contact Recreation (REC1) Non-contact Water Recreation (REC2) Shellfish Harvesting (SHELL) Fish Spawning (SPWN) Wildlife Habitat (WILD)

Requirements of this Order implement the Basin Plan.

- I. **National Toxics Rule (NTR) and California Toxics Rule (CTR).** USEPA adopted the NTR on December 22, 1992, and later amended it on May 4, 1995 and November 9, 1999. About forty criteria in the NTR applied in California. On May 18, 2000, USEPA adopted the CTR. The CTR promulgated new toxics criteria for California and, in addition, incorporated the previously adopted NTR criteria that were applicable in the state. The CTR was amended on February 13, 2001. These rules contain water quality criteria for priority pollutants.
- J. **State Implementation Policy.** On March 2, 2000, the State Water Board adopted the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (State Implementation Policy or SIP). The SIP became effective on April 28, 2000 with respect to the priority pollutant criteria promulgated for California by the USEPA through the NTR and to the priority pollutant objectives established by the Regional Water Board in the Basin Plan. The SIP became effective on May 18, 2000 with respect to the priority pollutant criteria promulgated by the USEPA through the CTR. The State Water Board adopted amendments to the SIP on February 24, 2005 that became effective on July 13, 2005. The SIP establishes implementation provisions for priority pollutant criteria and objectives and provisions for chronic toxicity control. Requirements of this Order implement the SIP.
- K. **Compliance Schedules and Interim Requirements.** Section 2.1 of the SIP provides that, based on a discharger's request and demonstration that it is infeasible for an existing discharger to achieve immediate compliance with an effluent limitation derived from a CTR criterion, compliance schedules may be allowed in an NPDES permit. Unless an exception has been granted under section 5.3 of the SIP, a compliance schedule may not exceed 5 years from the date that the permit is issued or reissued, nor may it extend beyond 10 years from the effective date of the SIP (or May 18, 2010) to establish and comply with CTR criterion-based effluent limitations. Where a compliance schedule for a final effluent limitation exceeds 1 year, the Order must include interim numeric limitations for that constituent or parameter. Where allowed by the Basin Plan, compliance schedules and interim effluent limitations or discharge specifications may also be granted to allow time to implement a new or revised water quality objective. This Order includes

compliance schedules and interim effluent limitations. A detailed discussion of the basis for the compliance schedules and interim effluent limitations is included in the Fact Sheet (Attachment F).

- L. Alaska Rule.** On March 30, 2000, USEPA revised its regulation that specifies when new and revised state and tribal water quality standards (WQS) become effective for CWA purposes. [40 CFR: §131.21; 65 Fed. Reg. 24641 (April 27, 2000)]. Under the revised regulation (also known as the Alaska Rule), new and revised standards submitted to USEPA after May 30, 2000, must be approved by USEPA before being used for CWA purposes. The final rule also provides that standards already in effect and submitted to USEPA by May 30, 2000 may be used for CWA purposes, whether or not approved by USEPA.
- M. Stringency of Requirements for Individual Pollutants.** This Order contains both technology-based and water quality-based effluent limitations for individual pollutants. The technology-based effluent limitations consist of restrictions on BOD, TSS, Oil and Grease, pH, and chlorine residual. Restrictions on these pollutants are discussed in the attached Fact Sheet, Attachment F. This Order's technology-based pollutant restrictions implement the minimum, applicable federal technology-based requirements. These limitations are not more stringent than required by the CWA. Water quality-based effluent limitations have been scientifically derived to implement water quality objectives that protect beneficial uses. Both the beneficial uses and the water quality objectives have been approved pursuant to federal law and are the applicable federal water quality standards. To the extent that toxic pollutant water quality-based effluent limitations were derived from the CTR, the CTR is the applicable standard pursuant to section 131.38. The scientific procedures for calculating the individual water quality-based effluent limitations for priority pollutants are based on the CTR-SIP, which was approved by USEPA on May 18, 2000. All beneficial uses and water quality objectives contained in the Basin Plan were approved under state law and submitted to and approved by USEPA prior to May 30, 2000. Any water quality objectives and beneficial uses submitted to USEPA prior to May 30, 2000, but not approved by USEPA before that date, are nonetheless "applicable water quality standards for purposes of the CWA" pursuant to section 131.21(c)(1). Collectively, this Order's restrictions on individual pollutants are no more stringent than required to implement the requirements of the CWA.
- N. Antidegradation Policy.** 40 CFR 131.12 requires that State water quality standards include an antidegradation policy consistent with the federal policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16, which incorporates the requirements of federal antidegradation policy. Resolution No. 68-16 requires that existing quality of waters be maintained unless degradation is justified based on specific findings. As discussed in detail in the Fact Sheet (Attachment F), the permitted discharge is consistent with the antidegradation provision of 40 CFR §131.12 and State Water Board Resolution No. 68-16.
- O. Anti-Backsliding Requirements.** CWA sections 402(o) (2) and 303(d)(4) and NPDES regulations at 40 CFR §122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. Some effluent limitations in the previous Order have been removed. As discussed in detail in the Fact Sheet (Attachment F), this removal of effluent limitations is consistent with the anti-backsliding requirements of the CWA and federal regulations.

- P. Endangered Species Act.** This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the Federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). This Order requires compliance with effluent limits, receiving water limits, and other requirements to protect the beneficial uses of waters of the state. The Dischargers are responsible for meeting all requirements of the applicable Endangered Species Act.
- Q. Monitoring and Reporting.** Section 122.48 requires that all NPDES permits specify requirements for recording and reporting monitoring results. Water Code Sections 13267 and 13383 authorizes the Regional Water Boards to require technical and monitoring reports. The Monitoring and Reporting Program establishes monitoring and reporting requirements to implement federal and State requirements. This Monitoring and Reporting Program is provided in Attachment E.
- R. Standard and Special Provisions.** Standard Provisions, which apply to all NPDES permits in accordance with section 122.41, and additional conditions applicable to specified categories of permits in accordance with section 122.42, are provided in Attachment D. The discharger must comply with all standard provisions and with those additional conditions that are applicable under section 122.42. The Regional Water Board has also included in this Order special provisions applicable to the Dischargers. A rationale for the special provisions contained in this Order is provided in the attached Fact Sheet, Attachment F.
- S. Notification of Interested Parties.** The Regional Water Board has notified the Dischargers and interested agencies and persons of its intent to adopt an NPDES permit and prescribe WDRs for the discharge and has provided them with an opportunity to submit their written comments and recommendations. Details of notification are provided in the Fact Sheet (Attachment F).
- T. Consideration of Public Comment.** The Regional Water Board, in a public meeting, heard and considered all comments pertaining to the discharge. Details of the Public Hearing are provided in the Fact Sheet (Attachment F) of this Order.

THEREFORE, IT IS HEREBY ORDERED, that Order No. 01-144 is rescinded upon the effective date of this Order except for enforcement purposes, and, in order to meet the provisions contained in division 7 of the Water Code (commencing with Section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act (CWA) and regulations and guidelines adopted thereunder, the Dischargers shall comply with the requirements in this Order.

### III. DISCHARGE PROHIBITIONS

- A.** Discharge of treated wastewater at a location or in a manner different from that described in this Order is prohibited.
- B.** Discharge of treated wastewater at any point where it does not receive an initial dilution of at least 25:1 is prohibited. During the periods of Delta outflows less than 8,000 cubic feet per second, the wastewater shall receive a minimum initial dilution of 45:1.
- C.** The bypass of untreated or partially treated wastewater to waters of the United States is prohibited, except as provided for in the conditions stated in 40 CFR 122.41(m)(4) and in A.13 of the